No. 77-719

In the Supreme Court of the United States

OCTOBER TERM, 1977

JEROME D. CHAPMAN, COMMISSIONER OF THE TEXAS DEPARTMENT OF HUMAN RESOURCES, ET AL., PETITIONERS

v.

HOUSTON WELFARE RIGHTS ORGANIZATION, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTION PRESENTED

The United States will discuss the question whether a state may compute a welfare recipient's standard of need by prorating and excluding the portion of shelter and utility expenses attributable to a non-eligible person residing with the welfare family.[1]

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[1] Petitioners also present (Br. 4-5, 8-10) the question whether the district court had jurisdiction under 28 U.S.C. 1343(4) to decide this case, in which no single plaintiff satisfies the $10,000 amount in controversy requirement for jurisdiction under 28 U.S.C. 1331(a). See Pet. App. A-8 to A-10, B-30 n. 1; cf. *Snyder* v. *Harris*, 394 U.S. 332. We do not

INTEREST OF THE UNITED STATES

This case presents the question whether Texas's method of computing benefits under the Aid to Families with Dependent Children (AFDC) program is consistent with federal statutes and with the regulations promulgated by the Secretary of Health, Education, and Welfare. Because the AFDC program is financed by matching federal and state funds, and because the statute requires state programs to comply with federal regulations (see 42 U.S.C. (and Supp. V) 602(a); *King* v. *Smith*, 392 U.S. 309), the Court's decision in this case could affect both the proper expenditure of federal monies and the Secretary's future decisions whether to approve state plans submitted to him. The United States therefore has a substantial interest in this case.

STATEMENT

A. The Texas Proration Policy

Under the AFDC program, 42 U.S.C. (1970 ed. and Supp. V) 601 *et seq.*, each participating state first establishes a standard of need to determine eligibility for benefits. It then sets the level of benefits to be paid, *i.e.*, the proportion of the standard of need that will be provided. Both the standard of need and the level of benefits vary from state to state. See generally *Jefferson* v. *Hackney*, 406 U.S. 535.

The Texas AFDC program is administered by the state Department of Public Welfare. Prior to March

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address this issue because there is no independent federal interest in its resolution.

1, 1973, the Department had three categories of "need"—personal needs allowance, shelter allowance, and utilities allowance—and a ceiling for each category (App. A-19 to A-21, A-25 to A-28). The Department calculated every family's need for each category, and the sum of need for the three categories was the need for the family. The state allowed payments of as much as 75 percent of the total need. Having ascertained both the standard of need and the maximum payment for each family, the Department subtracted available non-welfare income to compute the grant to be made (App. A-27; see also *Jefferson* v. *Hackney*, *supra*, 406 U.S. at 539-541).

In making its determination of the standard of need, Texas long had a policy of prorating or reducing the maximum allowable shelter and utility allowances if a non-eligible person resided with an AFDC recipient (Pet. App. A-19). The state treated some of the shelter and utility allowances as attributable to the ineligible person, and it subtracted this attributed portion from the level of need that would have been recognized if every member of the household had been eligible for benefits. This meant, in practice, that benefits paid to the AFDC family were reduced on account of each ineligible person in the household, whether or not the ineligible person contributed any financial support to the household.

The proration policy in effect prior to March 1, 1973, was set forth in Sections 3122 and 3122.3 of the Texas Department of Public Welfare Financial Services Handbook, Revision Number 23. It pro-

vided that, when an AFDC recipient shared living arrangements with non-dependent relatives, the recipient's budget, used in determining his standard of need, would be measured by his "prorata share" of the total utility and shelter expense "provided the non-dependent relative does not meet this expense for him."[2] This policy had a substantial effect on

[2] Paragraph 5 of Section 3122 provided (App. A-36):

> When a recipient shares living arrangements with non-dependent relatives, his budget will carry his prorata share and that of his dependents of the utility chart figure, provided the nondependent relative does not meet this expense for him.

Paragraphs 4-6 of Section 3122.3 provided (App. A-35):

> When the applicant or recipient lives with non-dependent relatives in their shelter, his prorata share(s) of the shelter expense within the group maximum shall be budgeted provided the non-dependent relative does not meet all this expense for him. This means that the applicant and/or recipient must actually be participating in meeting shelter expense before his prorata share(s) can be budgeted.
>
> When non-dependent relatives live with the applicant in his shelter, the applicant's prorata share(s) of the shelter expenses within the group maximum shall be an allowable expense, providing the non-dependent relatives do not meet this expense for him.
>
> Regardless of the economic situation of the non-dependent relative in either of the above situations, both shelter and utilities will be budgeted only in the amount of the prorata share for the applicant and his dependents.

Although the regulations refer only to instances where "non-dependent relatives" live with a recipient, the state and the courts below construed these provisions as applicable to all cases where a recipient lived with any non-eligible person (Br. 6; Pet. App. A-19 to A-20, B-33 to B-34).

families living with ineligible persons.[3]

On March 1, 1973, Texas discontinued the practice of adding categories of need to determine an individual standard of need for each family. The state adopted a "flat grant" system that used only two factors—the number of recipients in the family unit and whether the family included a caretaker recipient—to fix the standard of need (App. A-28, A-31). The standard of need for each family size was determined by averaging the amounts that had been paid to similar families in four representative months (November 1971, February 1972, May 1972, and August 1972) (App. A-48 to A-63). The conversion to this flat grant system was approved effective February 1, 1973, by the Associate Regional Commissioner, As-

[3] The operation of the proration policy is illustrated by the administrative decision issued in the case of respondent Paula Ortega, who receives AFDC benefits for herself and her son (App. A-5). Respondent's sister (who is permanently disabled) and her mother live with her (*ibid.*). In 1971 respondent's shelter and utilities allowances were both reduced by application of the proration policy (App. A-45 to A-47). The maximum shelter allowance for four persons was $44, or $11 per person, and thus $22 was set as the need for respondent and her son (*ibid.*). The utility allowance was $13 per family, and thus $3.25 for each of the four persons, with $6.50 allowed for respondent and her son (*ibid.*). Their standard of need thus was fixed as $28.50, plus the need for food. If, however, respondent's mother and sister had not resided with them, the standard of need would have been $46 plus food, composed of $33, the maximum housing allowance for two persons, plus $13 for utilities (see App. A-21).

sistance Payments Administration, Social and Rehabilitation Service[4] (see App. A-40 to A-43, A-57).

B. The Present Proceedings

On March 27, 1973, respondents filed this suit in the United States District Court for the Southern District of Texas. They contended, *inter alia*, that (1) Texas's proration policy prior to March 1, 1973, violated the federal statute and the implementing regulations; and (2) because the flat grants paid after March 1, 1973, were calculated by averaging the amounts paid during 1971 and 1972, the flat grant system carried forward the effects of the previous policy and was likewise invalid (App. A-11 to A-13). The complaint requested declaratory and injunctive relief, as well as retroactive payments of benefits computed without regard to proration (App. A-2 to A-3, A-12 to A-13).

On February 11, 1975, the district court certified the suit as a class action on behalf of AFDC recipients whose benefits had been reduced by the conversion to the flat grant system (Pet. App. A-10). The court upheld the conversion to a flat grant system, relying in major part on *Rosado* v. *Wyman*, 397 U.S. 397, 419, in which this Court concluded that a state's conversion to a flat grant system does not violate 42 U.S.C 602(a)(23), providing that all the factors in the old equation are "accounted for

[4] The Assistance Payments Administration is now part of the Social Security Administration. See 42 Fed. Reg. 13262.

and fairly priced and providing the consolidation on a statistical basis represents a fair averaging * * *."

The district court also upheld Texas's proration policy and the influence that policy had had on the standard of need after conversion to the flat grant system. It rejected respondent's contention that the proration policy contravened 42 U.S.C. 602(a)(7) and that section's interpreting regulations, 45 C.F.R. 233.90(a) and 45 C.F.R. 233.20(a)(3)(ii)(*c*) (1974), which provide that the state agency in determining need shall take into consideration the income and resources of the child, including only the net income of the parent in the absence of the proof of actual contribution from others. The district court concluded that the proration policy had not operated as an impermissible assumption of income, but rather had been a proper method of determining the standard of need for AFDC recipients living in households that also included non-recipients whose needs were not compensable under the Act (Pet. App. A-19 to A-24).

The court of appeals agreed with the district court that the conversion to a flat grant system was proper (Pet. App. B-40 to B-45).[5] It held, however, that Texas's standard of need must be revised to eliminate any continuing influence of the proration policy, which it found had been unlawful. The court saw no meaningful distinction between Texas's proration policy and the state regulations held invalid in *Van Lare* v.

[5] The approval of the conversion is no longer an issue in the case.

Hurley, 421 U.S. 338, because both were based on the presumption that an ineligible person living in an AFDC household would contribute to the costs of the shelter and utilities whether or not the ineligible person did so. The court also concluded (Pet. App. B-38) that the Texas policy contravened 45 C.F.R. 233.90 (a), because (Pet. App. B-38):

> The presumption that a recipient's shelter and utility expenses are lowered—creating less need—when a non-recipient lives in the household implicitly presumes that the non-recipient's income is available to offset his share of the shelter and utility costs. [Citations omitted.] If not, the recipient's "need," in terms of actual shelter cost, will not decrease.

Finally, the court of appeals concluded that the invalid proration policy had infected the averaging process used to convert to the flat grant system of March 1, 1973, and had obscured the standard of need (Pet. App. B-40 to B-41). Accordingly, the court held that Texas must recompute its standard of need free of the taint of proration (Pet. App. B-46).[6]

SUMMARY OF ARGUMENT

A. The proration policy Texas employed until 1973 was abandoned, at least in name, when the state converted to a system under which a family's "standard of need" is fixed by reference to two factors: the number of persons in the family, and whether the family includes a caretaker. The lawfulness of this pre-1973 policy is a matter of more than academic interest, however, because the present system for fixing the standard of need is based on an averaging of benefits paid during years when the proration policy was in effect. If the proration policy unlawfully reduced the standard of need for individual families in those years, it also reduced the averages from which current benefits were computed and thereby obscured the actual standard of need. Although the states may provide a level of benefits that gives AFDC recipients less than 100 percent of their standard of need, federal law prohibits the states from obscuring the actual standard of need. *Rosado* v. *Wyman*, 397 U.S. 397.

B. In *Van Lare* v. *Hurley*, 421 U.S. 338, this Court concluded that the Social Security Act and implementing regulations prohibit states from assuming that a non-legally responsible person living with a welfare family will apply his resources to aid a welfare child. Texas's proration policy was invalid under *Van Lare*, because the mere presence of an ineligible person in the AFDC household resulted in a decrease in benefits to the needy child—whether or not that person contributed any amount to the child or even paid his own housing expenses. It makes no difference that Texas did not in express terms presume that the child received income from the ineligible person. Texas's program, which reduced the

[6] The court held that the Eleventh Amendment bars an award of retroactive benefits (Pet. App. B-45).

"standard of need" of the family whenever an ineligible person was in the residence, had the same effect on children as does an attribution of income. Indeed, New York had sought to justify the regulation at issue in *Van Lare*—which did not expressly mention income—on the same grounds as petitioners advance here.

The Secretary also has rejected the arguments petitioners advance, and the current federal regulations provide that "the money amount of any need item included in the standard will not be prorated or otherwise reduced" simply because an ineligible person resides with an AFDC family. 45 C.F.R. 233.20 (a)(2)(viii). These regulations make it clear that Texas's proration policy was invalid.

Insofar as Texas's current flat grant system perpetuates the effects of the invalid proration policy, it conflicts with the Act and federal regulations, and it too is invalid. Accordingly, Texas's current standard of need must be recomputed, even though the resulting change in actual disbursements may be small.

ARGUMENT

A. The Standard Of Need Used By A State Must Reflect Actual Need

The proration policy that Texas applied until 1973 was abolished, at least in name, by the state's conversion to a system under which a family's "standard of need" is fixed by reference to but two factors: the

number of persons in the family and whether the family includes a caretaker recipient (App. A-28, A-31). The vice of the proration system was that benefits would be reduced when an ineligible person lived with the eligible family, whether or not that person contributed to the family or to the cost of lodging. See *Van Lare* v. *Hurley*, 421 U.S. 338. Since February 1973, however, Texas has not reduced any family's grant when an ineligible person shared its dwelling. It therefore might appear at first glance that the lawfulness of Texas's pre-1973 policy is of no more than academic interest, given the court of appeals' unchallenged holding (Pet. App. B-45) that the Eleventh Amendment prohibits the award of retroactive benefits.

The proration policy has outlived its nominal demise, however. The present system for fixing the "standard of need" depends on an averaging of benefits that were paid in 1971 and 1972, years when the proration policy was in effect. If the proration policy unlawfully reduced the standard of need for numerous families during those years, therefore, it also reduced the average on which today's benefits are computed. Petitioners appear to argue that this is immaterial because, under the principles of *Jefferson* v. *Hackney*, 406 U.S. 535, a state is entitled to set a "level of benefits" that gives AFDC recipients less than 100 percent of their computed "standard of need." Texas now pays recipients a maximum of only 75 percent of their standard of need. Thus, petitioners apparently argue, whether or not the proration

policy reduced the average standard of need in 1971 and 1972, respondents could not benefit, because the state could simply reduce its level of benefits if it were required to increase its standard of need.

This superficially plausible argument fails because Congress has required states to compute the standard of need accurately whether or not they choose to make the level of benefits commensurate with the standard of need. 42 U.S.C. 602(a)(23). As the Court explained in *Rosado* v. *Wyman*, 397 U.S. 397, 412-413, in the course of upholding a procedure for setting a uniform (rather than individually-calculated) standard of need:

> We think two broad purposes may be ascribed to [the federal statute]: First, to require States to face up realistically to the magnitude of the public assistance requirement and lay bare the extent to which their programs fall short of fulfilling actual need; second, to prod the States to apportion their payments on a more equitable basis. Consistent with this interpretation of [the statute], a State may, after recomputing its standard of need, pare down payments to accommodate budgetary realities by reducing the percent of benefits paid or switching to a percent reduction system, but it may not obscure the *actual* standard of need.

Petitioners appear to concede (Br. 6) that the application of the proration system in 1971 and 1972 affected the computation of the average standard of

need that was announced in 1973.[7] See also Pet. App. B-40 to B-41. Consequently, if the proration system was unlawful, it "obscure[d] the *actual* standard of need", and the standard of need must be recomputed to come into compliance with federal law. After the recomputation, Texas would be free to reduce its percentage level of benefits, in which event respondents and the class they represent would be no better off, but the didactic purpose of the federal statute would be fulfilled. The state may, however, elect to leave its percentage level of benefits unchanged, in which event a recomputation of the standard of need would lead to an increase in the payments to respondents and their class. The essential question in the case, then, is whether the proration policy in effect until 1973 was lawful, and we turn to that question.

B. The Texas Proration Policy Effectively Presumed That Persons Living With An AFDC Family Who Were Ineligible For AFDC Benefits Would Contribute To The Eligible Family Or To The Expenses Of Lodgings, And It Thus Distorted The Standard Of Need

1. The New York regulations at issue in *Van Lare* reduced an AFDC family's shelter allowance if a

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[7] Petitioners' brief states (Br. 6) that "[b]oth before and after the March 1 [,1973] consolidation Texas prorated a recipient's shelter and utility expenses in calculating the standard of need if one or more noneligible individual(s) resided with the recipient." Although this statement is ambiguous, it is our understanding that Texas continued to prorate after March 1, 1973, only by the inclusion of prorated amounts in its flat grant calculation.

person ineligible for AFDC benefits shared the family residence and did not pay at least $15 per month.[8] The Court concluded (421 U.S. at 347) that the case was controlled by *King* v. *Smith*, 392 U.S. 309, and *Lewis* v. *Martin*, 397 U.S. 552, which "construe the federal law and regulations as barring the States from assuming that nonlegally responsible persons will apply their resources to aid the welfare child." Accordingly, the Court held the New York regulations invalid "insofar as they are based on the assumption that the nonpaying lodger is contributing to the welfare household, without inquiry into whether he in fact does so" (421 U.S. at 346). The Court found that the New York regulations were indeed based on such an assumption, because "the nonpaying lodger's mere presence results in a decrease in benefits"—whether or not the lodger contributed to the support of the child. 421 U.S. at 346-347.

The regulation on which the Court relied in *Van Lare*, *supra*, was 45 C.F.R. 233.90(a), which provided:

> * * * In establishing financial eligibility and the amount of the assistance payment, only such

[8] The New York regulation, 18 N.Y.C.R.R. § 352.30(d), defined a lodger as any "nonlegally responsible relative or unrelated person in the household, who is not applying for nor receiving public assistance." The same section then provided:

> In the event a lodger does not contribute at least $15 per month, the family's shelter allowance including fuel for heating, shall be a pro rata share of the regular shelter allowance.

> net income as is actually available for current use on a regular basis will be considered, and the income only of [a natural or adoptive parent, or stepparent legally obligated to support the child] will be considered available for children in the household in the absence of proof of actual contributions.

Following *Van Lare*, the Secretary amended the regulations to reflect more precisely the Court's construction of the Social Security Act. A new section was added, 45 C.F.R. 233.20(a)(2)(viii), 42 Fed. Reg. 6584, which provides:

> * * * the money amount of any need item included in the standard will not be prorated or otherwise reduced solely because of the presence in the household of a non-legally responsible individual; and the agency will not assume any contribution from such individual for the support of the assistance unit.[9]

Texas's proration policy is indistinguishable from the New York policy struck down in *Van Lare*. Under the Texas policy, as under the New York regulations, the mere presence of an ineligible person in the AFDC household resulted in a decrease in benefits to the needy child—whether or not the ineligible

[9] Similar language was added to 45 C.F.R. 233.90(a), 42 Fed. Reg. 6584:

> * * * [N]or may the State agency prorate or otherwise reduce the money amount for any need item included in the standard on the basis of assumed contributions from nonlegally responsible individuals living in the household.

person contributed any amount to the child, or even paid for his share of the cost of housing.

2. Petitioners contend (Br. 12-13), however, that the line of cases from *King* v. *Smith* to *Van Lare* applies only to state plans that presume a contribution of income, and not to a policy that "speaks only in terms of budgeting a standard of need and the item(s) to be included there." Because Texas considers proration as part of its calculation of the standard of need, petitioners argue (Br. 14-16), the policy was within its discretion. Moreover, petitioners maintain (Br. 6), the proration policy was intended "to take advantage of economies of scale and to prevent the State's limited financial resources available for Aid to Families With Dependent Children from being diverted to the benefit of ineligible persons." In our view, however, the principle of *Van Lare*, now codified in the federal regulations, does not depend on whether benefits were reduced by imputing fictitious income to a family (as in New York) or by saying that a family with the same resources is "less needy" (as Texas did). The two are functionally identical.

What is more, the portion of the New York regulations at issue in *Van Lare* provided only that unless a lodger contributed $15 to the family's expenses, the family's shelter allowance would be reduced pro rata; the regulations did not expressly mention "income." [10]

[10] One subsection dealing with instances where a female recipient was living with a man (18 N.Y.C.R.R. § 352.31) did refer to the way "his available income and resources" were to be applied, but the portion of the regulations the Court held invalid was the provision in 18 N.Y.C.R.R. § 352.30(d) quoted in n. 8, *supra*, which applied to all ineligible persons and made no reference to income. See 421 U.S. at 342, 346.

The Second Circuit, in a decision reversed by this Court in *Van Lare*, had upheld the New York regulations on the very grounds petitioners advance here, *i.e.*, that they merely provided a means of determining the recipient's needs, which were affected by the economies of scale, and prevented ineligible persons from benefiting from living space paid for by AFDC benefits. *Taylor* v. *Lavine*, 497 F.2d 1208, 1215. This Court rejected the distinction the state sought to draw in *Van Lare*, and it should do so again here. As the court of appeals correctly reasoned (Pet. App. B-38):

> The presumption that a recipient's shelter and utility expenses are lowered—creating less need —when a nonrecipient lives in the household implicitly presumes that the nonrecipient's income is available to offset his share of the shelter and utility costs. *See Hoehle* v. *Loking*, 405 F.Supp. 1167, 1174 (D.Minn. 1975), *aff'd*, 538 F.2d 229 (8th Cir. 1976). If not, the recipient's "need," in terms of actual shelter cost, will not decrease. [Petitioner's] claim that it is only reflecting the economies of scale enjoyed by large groups living together again implicitly presumes that the non recipient's income will be available to offset shelter and utilities. Without that presumption, the economies-of-scale argument is irrelevant. As examples, the total cost of shelter and utilities to the AFDC household has not changed; it remains in need of that amount. *See Taylor* v. *Lavine*, 497 F.2d 1208, 1222 (2d

Cir. 1974) (Oakes, J., dissenting); Note, 88 HARV. L. REV. 654, 658-59 (1975). If the nonrecipient moves out, the household receives a full share even though its rent obligation has not increased. Clearly, as in *Van Lare*, "the nonpaying lodger's mere presence results in a decrease in benefits", 421 U.S. at 346, 95 S.Ct. at 1747, and "the fact that the allowance varies with the lodger's presence demonstrates that it is keyed, as the regulations plainly imply, to the impermissible assumption that the lodger is contributing income to the family." 421 U.S. at 347, 95 S.Ct. at 1748.

The Secretary has concluded that "prorating the standard of need is another form of assumption of income from non-legally responsible individuals[,] which has long been prohibited by Federal regulations." 42 Fed. Reg. 6583. The present regulations reflect this view, and they provide that "the money amount of any need item included in the standard will not be prorated or otherwise reduced." 45 C.F.R. 233.20(a)(2)(viii). The states' plans must yield to authorized regulations of the Secretary (*King* v. *Smith*, *supra*, 392 U.S. at 316-319). These regulations could not be clearer, and they demonstrate that Texas's proration policy was invalid.

3. Insofar as the Texas flat grant system perpetuates the effects of the proration policy, it conflicts with the Act as construed in *Van Lare* and the revised federal regulations, and it, too, is invalid. *King* v. *Smith*, *supra*, 392 U.S. at 333 n. 34; *Townsend* v. *Swank*, 404 U.S. 282, 286; *Burns* v. *Alcala*,

420 U.S. 575, 578. Accordingly, the court of appeals properly concluded (Pet. App. B-46) that Texas must recompute the flat grant standards of need to purge the averages "of the proration taint." [11]

We recognize that the change in Texas's flat grant standard of need resulting from the elimination of prorated cases may be slight. Despite petitioners' apparent admission that the invalidation of its proration policy would require the establishment of a new standard of need (Pet. App. B-41), the statistical significance of including prorated cases in the averaging process has not been demonstrated. Additionally, because Article 3, Section 51-a, of the Texas Constitution limits state financial participation in federal welfare programs to $80,000,000, it is possible that recomputation may result in no increase in actual disbursements of AFDC payments. See *Jefferson* v. *Hackney*, *supra*, 406 U.S. at 537 n. 1. The record does not indicate whether current benefits could be increased without exceeding this constitutional maximum.

Nevertheless, Texas's standard of need must be recomputed—even if the change in actual disburse-

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[11] Petitioners also argue (Br. 10-12) that the court of appeals' decision conflicts with this Court's conclusion in *Jefferson* v. *Hackney* that Texas complied with 42 U.S.C. 602(a)(23). *Jefferson*, however, addressed only the contention that the method by which Texas computed the percentage reduction of all benefits to accommodate the state's budgetary limits violated Section 602(a)(23). 406 U.S. at 545. Texas's proration policy was not at issue, and the Court did not consider any questions concerning the allocation of benefits within categories of assistance.

ments is small—because the proration was contrary to federal requirements discussed above and because it obscured the true level of need. *Rosado* v. *Wyman*, *supra*, held that consolidation to a flat grant system using a statistically fair averaging is permissible only when "all factors in the old equation are accounted for and fairly priced." 397 U.S. at 419. As the court of appeals concluded (Pet. App. B-40 to B-41), Texas's inclusion of prorated amounts paid for shelter and utilities in the averaging process necessarily skewed the standard of need downward and prevented the fair pricing of the shelter and utilities component of the consolidated standard of need.[12]

CONCLUSION

If this Court reaches the substantive issues, it should affirm the judgment of the court of appeals.

Respectfully submitted.

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Assistant to the Solicitor General.

MAY 1978.

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[12] In the instant case the administrative burden and cost of recalculating the standard of need for the future cannot be avoided, although it may be possible to minimize these effects by techniques such as sampling.

This is not a case in which a state has increased the amount of its flat grants since the July 1, 1969, reappraisal required by 42 U.S.C. 602(a)(23). In cases where there has been such an increase, a state might argue that any carry-over effect of its past proration has been offset by increases in the amounts of its flat grants.

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